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No. 96-1341

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SHARON BONDS, *ET AL.*,
Petitioners,

v.

DISTRICT OF COLUMBIA, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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OPINIONS BELOW

The orders denying rehearing and rehearing *en banc* (pet. 46a-48a) are reported at 105 F.3d 674.

STATEMENT OF THE CASE

A. INTRODUCTION. After careful scrutiny of all relevant circumstances, the court of appeals concluded that the trial court abused its discretion when it prohibited the District of Columbia Department of Corrections from presenting fact witnesses in a jury trial of a class action alleging sexual harassment and retaliation. Pet. 1a-22a. The preclusion order was based on the government's answer, which the district court deemed inadequate, to a sweeping interrogatory asking for the identity of everyone who had knowledge of allegations in 229 paragraphs (spanning 41 pages) of the amended complaint, covering roughly *four thousand* prison employees, and to "describe the matters" that each identified person knew. In

an order extending for two weeks the time to answer this and other interrogatories, the district court had directed that anyone not identified within five days would not be allowed to testify.

The preclusion order applied to all fact witnesses, including those whom petitioners had already deposed or noted for deposition. The trial court ordered the blanket preclusion despite petitioners' representation to the court that they would not be prejudiced by a narrower order precluding testimony only from witnesses who had not been deposed.

It is undisputed that the Department violated no other discovery rule or order, before or after November 1994.

The court of appeals held that the sanction was so disproportionate as to be unjust. It ruled only after careful review of all the circumstances and after it had taken the extraordinary step of remanding after oral argument so that the district court could give a fuller justification for the preclusion order. Pet. 52a-58a.

This appeal does not deserve further review. The decision is entirely consistent with governing precedent, including *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), and with decisional law in all circuits.

B. The Sanction and Its Consequences. The amended complaint, filed in January 1994, alleged that the District of Columbia's Department of Corrections engages in illegal patterns of sexual harassment of its 1500 female employees, sexual favoritism, and retaliation against employees who oppose such conduct. The complaint, brought as a class action, is 56 pages long and contains 281 numbered paragraphs.

Initially, petitioners had been represented by four counsel and the government by one; beginning in June, petitioners were represented by *eight* lawyers and the government by two.

Between April and December 1994, the parties engaged in extensive discovery. By petitioners' own admission, the Department of Corrections had provided over *thirteen feet* of materials in response to requests for production of documents.

Pet. 20a. In June, counsel for the petitioners informed the court that "we have now gotten most although not all of the discovery which we asked for."

Petitioners' first set of interrogatories, which gave rise to the sanction, were served three months later and were due on October 24, 1994. One of the interrogatories, no. 2, asked the Department to identify "all persons having knowledge of or evidence that concerns the matters set forth in paragraphs 23 through 251" of the complaint and to "describe the matters concerning which such person has knowledge or evidence." Pet. 7a.

Between about the time that the interrogatories were filed in late September and the time that the Department moved for reconsideration of the discovery sanction in mid-December, petitioners took *sixty-six* depositions, *forty-nine* of them by November 10. Pet. 6a. During the thirty days after service of the interrogatories, petitioners' counsel served the District with a notice to take *thirty-two* depositions in October and at about the same time served a second request for production of documents.[1] On October 12, counsel noticed *forty* depositions (rescheduling many of those noticed earlier in October) between October 25 and December 7. The schedules in these notices called for daily depositions occupying all day virtually every day, except for several Fridays and the days immediately before and after Thanksgiving.

While the interrogatories were outstanding, the government's two counsel participated in two show-cause hearings; participated in several mediation sessions; and filed fourteen pleadings in addition to attending the scheduled depositions. (The show-cause hearings related to charges of retaliation in violation of a preliminary injunction that the district court had issued in June to protect the named plaintiffs from retaliation).

On October 6, government counsel gave the district court a list of the staffing that would be needed to cover the deposi-

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[1] By contrast, F.R. Civ. P. 30(a)(2), which did not apply to this litigation, presumptively limits depositions to *ten* per side.

tions petitioners planned to take. Although the schedule showed a need for "Atty 3" and "Atty 4," counsel told the court that those attorneys "do not exist." Both before and after the preclusion sanction was imposed, counsel explained that severe budgetary limitations had necessitated a cut in legal personnel employed by the District of Columbia at the same time that civil suits, juvenile prosecutions, mental health and child support proceedings, and other actions by and against the government were increasing as much as 25% annually. The district court later acknowledged that the government's plight was "well-known to the court." Pet. 35a, n. 3.

Overwhelmed by the depositions and other litigation demands, counsel for the Department of Corrections moved for a two-week extension of time to respond to the interrogatories on October 24. Petitioners opposed the extension but, alternatively, asked that the Department be prevented from calling at trial any person who had not been identified by November 7, the end of the two-week extension.

On November 2, a Wednesday, the district court entered an order granting the extension to answer the interrogatories until the following Monday, November 7, five days later. The order specified that anyone not identified by the government in response to interrogatory no. 2 could not be called at trial, whether or not previously deposed or noticed for deposition.

The Department of Corrections served its answers to all of the interrogatories on November 10. Its answer to interrogatory no. 2 referred petitioners to the discovery materials provided in response to the request for production and in the depositions. At a status conference a week later, on November 17, counsel for the Department told the court that the answer was permitted by F.R. Civ. P. 33(d), which allows interrogatories to be answered by specifying where the information sought may be obtained when the answers can be derived from the interrogated party's business records and when the burden of extracting the information is substantially the same for both parties.

Respondents—the Department and its director—had no personal knowledge of the facts. At no time have petitioners (or the district court) questioned the Department's assertion that the only way it could respond to interrogatory no. 2 was to comb through the depositions and the thirteen feet of business records that had already been provided. At the status hearing, therefore, counsel for the Department told the district court: "plaintiffs have what defendants know about this case."

In preparation for the status conference, petitioners' counsel asked the court for an order imposing a more limited sanction: "absent good cause shown, the defendants be limited at trial to call *only witnesses whom the plaintiffs have deposed* and to be limited in their examination to topics the plaintiffs have covered in their deposition." Pet. 8a; italics added. The sanction that petitioners proposed would have had extremely serious consequences. At trial, the Department proffered more than fifty witnesses that it had intended to call. Pet. 10a. The sanction would have excluded ten at the liability stage and sixteen more at the damages stage. Nevertheless, without mentioning petitioners proposal, the district court on November 17 held the Department's response to interrogatory no. 2 to have been inadequate and ordered that "*no* witnesses may be called at trial unless defendants successfully move for reconsideration." Pet. 8a.; italics added.

The Department's lead counsel was sick for two weeks, from November 15 to November 28, and did not attend the status conference. Its other counsel resigned on November 25, ten days after the status conference, to become law clerk to a judge.

On December 12, the Department moved for reconsideration of the sanction and submitted a 27-page supplemental answer to interrogatory no. 2, an alphabetized list of about a thousand people with knowledge of allegations contained in the complaint and, for most, a brief description of their relationship to the allegations. The information had been extracted from approximately seven dozen depositions taken in the

litigation and from the business records given to petitioners in response to discovery.

The district court denied reconsideration on January 25, 1995, saying that "giving a thousand names was a perfect demonstration of how not to comply with my order * * * and the defendants will not be able to call fact witnesses at trial." Pet. 34a.

The case went to trial in April 1995 with the sanction intact. The jury awarded $1.4 million in damages to six of seven named plaintiffs (the eighth was not entitled to jury trial) and the court awarded another $400 thousand in back pay and gave other equitable relief. More importantly, the district court ordered transfer of control of investigatory and disciplinary functions of the Department of Corrections personnel system to a court-appointed "special inspector" for an indeterminate period. The court also ordered damage trials for all class claimants (of whom there are currently about 127). Because of the jury's finding on class-wide liability, the Department will bear the burden of proof that the claimants have not been sexually harassed or the targets of retaliation.

In August 1995, ten months after imposing the sanction and eight months after denying reconsideration, the district court issued findings of fact to justify the preclusion. Pet. 26a-40a. The court wrote that the Department had violated F.R. Civ. P. 37(d) by "fail[ing] to provide an appropriate response to Interrogatory 2." Pet. 37a.[2] Because the Department had not, in the court's view, complied with the court's November 2 order, the Department had also violated F.R. Civ. P. 37(b)(2). *Id.* The court held that the supplemental answer was both "over-inclusive" and "under-inclusive" and the Department had not explained why it could not

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[2] The trial court's reliance on F.R. Civ. P. 37(d) was plain error. Rule 37(d) "is inapplicable if the party has served answers to interrogatories but the answers are thought to be incomplete or evasive." C.A. Wright, A.R. Miller, & R.L. Marcus, 8A FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D (1994) § 2291 at 719; footnote omitted; *see also id.*, n. 13.

have been produced earlier. Pet. 32a. The court called the filing a "ploy" and "further evidence of bad faith." Pet. 33a, 37a.[3] "If tolerated," it would have required "a substantial delay in the trial." Pet. 33a. The court added that it was "no excuse that the District of Columbia may have denied its Corporation Counsel the wherewithal to properly defend this lawsuit." Pet. 36a.

The contents of the supplemental response apparently would not have mattered in any event because the court wrote that it could not reconsider the sanction without endangering the trial schedule or prejudicing petitioners. Pet. 39a-40a. The sanction was also essential to deter similar conduct, a need "particularly evident when the disobedient party is a government entity." Pet. 40a.

C. THE REMAND. After oral argument, the court of appeals remanded for a fuller explanation why the lesser sanction proposed by petitioners would not have served the district court's "legitimate concerns." Pet. 51-52. The district court, in turn, asked petitioners' counsel to respond to the inquiry and then adopted petitioners' response as its own with one significant omission. Pet. 59a-75a.

In essence, the resulting "Statement of Reasons" said that the sanction imposed, rather than the one that petitioners had suggested, "went beyond deterrence to include avoiding prejudice to plaintiffs, preventing defendants from benefitting from

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[3] The "*further* evidence" language was drafted by petitioners' counsel and may refer to another of their proposed findings that the district court adopted which ignored the absence of lead counsel for the Department at the November 17 status conference. At the December 21 hearing on the motion for reconsideration, the Department had argued for the first time that the court's November 2 order had not been received until November 7. The finding stated: "That new excuse for their failure to comply with the discovery request was inconsistent with their prior explanation, thereby casting doubt on counsel's credibility on this issue." Pet. 33a, ¶ 20. The court of appeals held that raising an issue about the date of receipt of the order only after lead counsel, the recipient, had recovered from her illness was insufficient evidence of bad faith. Pet. 19a.

their misconduct, and avoiding burdensome changes to this Court's schedule." Pet. 75a. Omitted from the district court's embrace of petitioners' formulation of reasons was the single example of prejudice that petitioners claimed to have suffered as a result of the Department's responses. Petitioners' draft had included the name of a potential witness who, they said, had not been revealed in discovery. The district court omitted the example after the Department showed that the witness had previously been identified. The district court statement therefore contained *no* concrete finding of prejudice.

D. THE COURT OF APPEALS' DECISION. The court of appeals reversed, holding that the district court had abused its discretion. Pet. 1a-22a. The court understood that, under *National Hockey League*, a trial court has broad discretion to impose sanctions for discovery violations. Pet. 10a. The court also recognized that it could therefore reverse only if the sanction preventing a party from being heard on the merits was wholly disproportionate to the violation and no lesser sanction would have served the trial court's legitimate concerns. Pet. 10a-13a.

Here, the preclusion order was equivalent in severity to a default judgment. Pet. 13a. A jury's resolution of the sexual harassment and retaliation claims would be so likely to turn on "the credibility of conflicting witnesses and * * * evaluation of Department employees' motives" that the preclusion of fact witnesses "left the District with little ability to contest the plaintiff[s'] claims." *Id.*; *see Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986)(claims of sexual harassment present "difficult problems of proof and turn[] largely on credibility determinations").

The record did not support the district court's conclusion that total preclusion of fact witnesses (rather than the limited preclusion petitioners had proposed) was necessary to serve the purposes that the district court had identified: "contrary to the district court's findings, the record provided *no evidence* of prejudice to the plaintiffs or the court's calendar, nor of benefit to the District [of Columbia]." Pet. 21a; italics added.

1. There was no reason to believe that the lesser sanction that petitioners themselves had proposed would have interfered with the trial date or with the court's docket. Pet. 16a. Part of the trial court's error was premised on the false assumption that interrogatory no. 2 was designed to identify witnesses whom petitioners might be able to call when, in fact, petitioners had told the court the interrogatory was intended to identify persons on whom the Department might rely at trial. *Id.* & n. 16. If the Department had been limited to calling only those people whom petitioners had already deposed or noticed for deposition, there would have been no need to postpone the trial date. Pet. 16a.

2. There was also no evidence that the sanction was necessary to avoid prejudice to petitioners because "there is *no evidence* that the District withheld anything in discovery." Pet. 21a; italics added. The lesser sanction that petitioners had suggested would have permitted them to prepare for cross-examination of government witnesses, the only purpose that petitioners had proffered for the interrogatory before remand. Pet. 17a. In any event, there was nothing in the record to support petitioners' claim, first raised after remand, that they were prevented from learning of witnesses that might have proved helpful to their case, and the district court had omitted their single example from its statement of reasons. *Id.*; *see* above, at 6.

3. There was no record support for the proposition that the Department would have benefitted from the lesser sanction that petitioners had proposed if it had been limited to calling only those witnesses already deposed or scheduled for deposition. Pet. 17a-18a. The responses to the interrogatory did not attempt to obtain unfair tactical advantage. Pet. 21a.

4. The sanction was not necessary as a deterrent to the District of Columbia or others. To the extent that the district court based its decision on the Department's prior conduct, the court had committed legal error because Rule 37 is a discovery sanction and not a catch-all to penalize other behavior, such as retaliation or sexual harassment. Pet. 19a. While

dilatory conduct in discovery would be relevant, requests for extensions of time are not themselves sanctionable "and there are *no findings* in the record as to the cause of problems with document production." Pet. 19a; italics added. There was also no basis in the record for a finding that the Department or its counsel were challenging the integrity of the court. Pet. 21a.

After examining the history of the pretrial proceedings, the court of appeals concluded that there was no record support for the proposition that this was a case where there had been protracted delay. Pet. 20a. Rather, "the record reveals efforts to meet numerous deadlines within a tight time period in a complex class-action suit." *Id.* Between the time the interrogatories and the answers were served, "there was a lot going on, often simultaneously, in a relatively short period of time." *Id.*; *see* above, at 3-4.

In short, the order precluding all witnesses was disproportionate to the single offense, "overly harsh, and thus, unreasonable" (pet. 22a) and was not necessary to serve the district court's legitimate interests in preventing trial delay, prejudice to petitioners, and deterring misconduct.

The full court denied rehearing, three of ten judges dissenting. Pet. 47a-48a.

REASONS FOR DENYING THE WRIT

The court of appeals' decision does not erode either the discovery rules or the holding in *National Hockey League* and does not conflict with decisional law in other circuits. To the contrary, the decision uses "abuse of discretion" standards that have been accepted by all circuits. It establishes no new law. The decision is based on a review of the record which revealed that the district court misapprehended the law in some instances and that there was inadequate evidence (or none) to support some findings. The court of appeals' decision was fact-based and error-correcting. This case does not warrant further review by the Court.

I. THE COURT OF APPEALS' DECISION IS NOT INCONSISTENT WITH THIS COURT'S PRECEDENT WHICH PRESERVES APPELLATE REVIEW FOR ABUSE OF DISCRETION.

However broad a trial court's discretion may be in imposing sanctions for discovery abuse under Rule 37(b), discretion is limited by the Rule's requirement that the sanction be "just." *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites*, 456 U.S. 694, 708 (1982)("Rule 37(b)(2) contains two standards * * * that limit a district court's discretion. First, any sanction must be 'just' * * *").

The authors of the treatise on federal civil procedure cited in *National Hockey League* have therefore written that discretion during discovery "though broad, is not limitless" and "does not mean that appellate courts should become rubber stamps." C.A. Wright, A.R. Miller, & R.L. Marcus, 8A FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D (1994) § 2284 at 615, 620. To be "just," "it seems fitting that courts should make the punishment fit the crime and should take care not to impose a drastic sanction that will prevent adjudication of a case on its merits except on clear showing that this course is required." *Id.* at 640; footnote omitted. Each of the circuits has therefore developed roughly similar criteria for reviewing discovery sanctions for abuse of discretion. *See id.* at 625-631, nn. 39-41; *see also* cases cited below, at 14-15, nn. 4-5.

This Court's precedent preserves the appellate courts' role of examining the record to determine whether the sanction is just. In *National Hockey League*, the Court reinstated the district court sanction only after examining the "factual history," 427 U.S. at 640, a history that the appellate court "did not question." *Id.* at 641. There, interrogatories had remained unanswered for *seventeen months* (*id.* at 642) and the "record show[ed] that the District Court was extremely patient in its efforts to allow the respondents ample time to comply with its discovery orders." *Id.* at 640. Under those circumstances, the district court had not abused its discretion in

finding bad faith on the part of the respondents and in dismissing their complaint because of "'flagrant bad faith'" and "'callous disregard'" of responsibilities by counsel. *Id.* at 643. In *Insurance Corporation*, 456 U.S. at 698-699, where the appellate court affirmed the relatively mild sanction of deeming jurisdictional facts to have been established, the refusal to provide discovery lasted for *ten months* (from June 1978 to mid-April 1979) and disregarded four intervening orders. Even then, the district court had left open a possibility for defendants to establish the absence of jurisdiction. *Id.* at 707-708. Under the circumstances, there was "'justice'" in the trial court's order. *Id.* at 708.

Neither *National Hockey League* nor *Insurance Corporation of Ireland* involved government bodies and therefore did not need to consider an important policy not present in purely private litigation. While governments are not immune from sanctions—including the harshest—the citizenry whom the government represents is the ultimate victim of the mistakes of government employees and counsel. Punishment meted out by a court for their failings falls on the democratic institutions of government. An appellate court can therefore reasonably be especially careful when reviewing a discovery sanction that prevents a government from presenting evidence on the merits.

In any event, in the present case, the court of appeals could reasonably conclude from the record that punishment that prevented the Department from presenting witnesses, *including those already deposed*, was a clear abuse of discretion because it was out of all proportion to the misconduct, unnecessary to serve any legitimate purpose, and inconsistent with the "factual history" revealed by the record. Here, there was nothing like the seventeen-month delay in *National Hockey League* or the ten-month delay in *Insurance Corporation*. There was a single violation of a discovery order, one issued five *days* before the discovery was due. The order was issued in the midst of a flood of depositions and other pre-trial activities. The Department had withheld nothing in discovery,

before or after. These historic facts, which the court of appeals examined with care, demonstrate no callous disregard of responsibilities—much less bad faith—that warranted the harshest sanction, either as punishment or deterrence.

II. The Court of Appeals Did Not Create or Apply a "Bad Faith" Standard.

The petition mischaracterizes the court of appeals' decision as holding that discovery sanctions can be inflicted only when the party at fault acted in bad faith; the court of appeals imposed no such standard. The petition cites no explicit statement by the court of appeals creating a "bad faith" standard and none can be inferred from the decision.

First, the court established *no* standard for discovery sanctions that are not equivalent in severity to dismissal or default. Milder sanctions were never at issue. As the court of appeals noted, on appeal the respondents challenged neither the district court's finding that a discovery violation had occurred nor the proposition that they were subject to a sanction, including the one petitioners themselves had suggested. Pet. 10a.

Second, the court of appeals held that, before the harshest penalty can be imposed, the punishment must be roughly proportional to the offense in light of all of the relevant historic facts. Pet. 11a. The court recognized that "flagrant and egregious" conduct justifies the harshest sanctions. Pet. 11a, 14a, 18a. Although flagrant and egregious conduct may often be motivated by bad faith, the court of appeals did not foreclose gross negligence and similar derelictions reasonably within the offending party's control as also meeting the flagrant and egregious conduct standard. Here, however, the court of appeals concluded that the record, as supplemented on remand, contained insufficient evidence that the Department of Corrections and its counsel had acted flagrantly or egregiously.

Third, the court of appeals' decision does not restrict a district court's power to issue the harshest sanctions—even when there has been no flagrant and egregious conduct—if evidence in the record shows that the discovery lapse prejudic-

es the other party, prejudices the judicial system, or is necessary to deter future discovery misconduct. The record in this case, the court concluded, could not reasonably be said to contain such evidence.

This Court need not reach an issue—the "bad faith" standard—that has no grounding in anything that the court of appeals wrote or implied. Petitioners' straw-man does not merit review by this Court.[4]

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[4] There is no inconsistency between the court of appeals' decision and the decisions cited in the petition at 13-14. In *Hyde & Drath v. Baker*, 24 F.3d 1162 (9th Cir. 1992), the court held that attorneys' fees may be awarded for discovery abuse without a finding of bad faith. *Id.* at 1171. However, when it comes to dismissal of a complaint, a trial court must first consider five factors similar to those used here, including prejudice to the other party, the court's need to manage its docket, and the availability of less drastic sanctions. *Id.* at 1166. In *Marrocco v. General Motors Corp.*, 966 F.2d 220 (7th Cir. 1992), the court affirmed dismissal of one action and a directed verdict in another when violations of protective orders led to the destruction of irreplaceable evidence. In one case the violation was deliberate; in the other, the result of "gross negligence" and a "flagrant disregard" of a duty to preserve the evidence. *Id.* at 222-223, 224. The court noted, however, "'[a] dismissal with prejudice is a harsh sanction which should usually be employed only in extreme situations, where there has been a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailable.'" *Id.* at 224; brackets, the court's; italics omitted. In *Cine Forty-Second Street Theatre Corp. v. Allied Artists Picture Corp.*, 602 F.2d 1062 (2d Cir. 1979), where the plaintiff had "frozen this litigation in the discovery phase for nearly four years" and where the trial court had previously imposed less severe sanctions, the court of appeals held that gross professional negligence justifies a preclusion sanction. *Id.* at 1068. The court cautioned, however, that sanctions "must be weighed in light of the full record in the case." *Id.*

III. THE REQUIREMENT THAT A TRIAL COURT ORDINARILY CONSIDER LESSER SANCTIONS BEFORE DENYING A PARTY THE RIGHT TO BE HEARD ON THE MERITS HAS BEEN UNIFORMLY ADOPTED BY THE CIRCUITS AND IS CONSISTENT WITH RULE 37(B).

In order that the sanction be "just," the District of Columbia Circuit has long held that lesser penalties must be explored before a party is prevented from being heard on the merits unless they would obviously prove futile. Pet. 11a-12a. If a party has acted flagrantly or egregiously, it is highly likely that lesser sanctions, if not already attempted, will be futile to deter future misconduct by that party or by others. *See* Pet. at 14a ("the more severe sanction must be supported by a finding of flagrant or egregious conduct" if deterrence is the sole purpose). When, however, conduct has not been flagrant or egregious, the trial court should first consider whether a lesser sanction will be ineffective to prevent prejudice to the other party or interfere with the court's docket.

The District of Columbia Circuit's standard of review resembles those adopted by other circuits, including the two cited in the petition at 17.[5] That standard permits appellate

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[5] *See, Velazquez-Rivera v. Sea-Land Service, Inc.*, 920 F.2d 1072, 1076 (1st Cir. 1990); *Outley v. City of New York*, 837 F.2d 587, 591 (2d Cir. 1988); *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984); *Hathcock v. Navistar International Transportation Corp.*, 53 F.3d 36, 41 (4th Cir. 1995); *Federal Deposit Insurance Co. v. Conner*, 20 F.3d 1376, 1380-1381 (5th Cir. 1994); *Freeland v. Amigo*, 103 F.3d 1271, 1277 (6th Cir. 1997); *Schilling v. Walworth County Park & Planning Commission*, 805 F.2d 272, 275 (7th Cir. 1986); *Adriana International Corp. v. Thoeren*, 913 F.2d 1406, 1413 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992); *Wouters v. Martin County*, 9 F.3d 924, 934 (11th Cir. 1993), *cert. denied*, 63 U.S.L.W. 3257 (1994). *See also*, above at 14, n. 4.

In *United States v. DiMucci*, 879 F.2d 1488 (7th Cir. 1989), cited in the petition, the court held that its general rule that "'de-

(continued...)

courts to determine whether a sanction is proportionate to the offense and is necessary to achieve the trial court's legitimate purposes without being a "'pointless exaction of retribution.'" Pet. 12a, quoting *Jackson v. Washington Monthly*, 569 F.2d 119, 123 (D.C. Cir. 1977). As the trial court decision cited in the petition demonstrates, the standard is workable and permits the harshest sanctions to be imposed whenever merited. *United States v. BCCI Holdings*, 169 F.R.D. 220, 223-224 (D.D.C. 1996)(dismissal of claim).

IV. THE COURT OF APPEALS CORRECTLY APPLIED THE CLEARLY ERRONEOUS AND ABUSE OF DISCRETION STANDARDS.

The court of appeals vacated the preclusion sanction because the district court's findings on critical matters had no evidentiary support and because the district court misapplied legal principles.

Findings of fact are clearly erroneous (1) when they have no support in the record or (2) "'when although there is evidence to support [them], the reviewing court is left with the definite and firm conviction that a mistake has been committed.'" *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985),

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[5] (...continued)

faults should be entered only when absolutely necessary, such as where less drastic sanctions proved unavailing'" is not an "absolute prerequisite" when the harshest sanction is appropriate. *Id.* at 1493-1494. The court found the sanction to be appropriate when defendants' noncompliance with five previous discovery orders "clearly constituted contumacious conduct" and "caused almost ten months of prejudicial delay." *Id.* at 1494. There is no essential difference between the Seventh and D.C. Circuit standards, as applied. *See Stafford v. Mesnick*, 63 F.3d 1445, 1451 (7th Cir. 1995)(reversing default judgment: conduct did not merit drastic sanction); *id.* at 1451 (sanction should be "based on the egregiousness of the * * * misconduct").

In *Avionic Co. v. General Dynamics Corp.*, 957 F.2d 555, 558 (8th Cir. 1992), cited in the petition, the court held that a trial court must examine whether a less extreme sanction will suffice unless the misconduct was "deliberate or in bad faith."

quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

In the present case, the court of appeals found *no* evidence in the record that the sanction that petitioners had suggested would have interfered with the trial schedule, prejudiced petitioners, or provided unfair tactical advantages to the Department. *See* above, at 8-9. It concluded that the record did not support a finding that the Department's failure to comply with the November 2 order within five days in the manner that the district court deemed satisfactory could possibly be characterized as contumacious or done in bad faith, considering "the context of the demands that plaintiffs' discovery requests"—including the sixty-six depositions—had "placed on defense counsel within the strict pre-trial schedule." Pet. 20a. Furthermore, on its face, the supplemental answer, prepared while the Department's lead counsel was ill and after its other counsel had resigned, did not demonstrate that the Department had not attempted to comply in good faith with the demand to identify "all persons" with knowledge of the allegations in the specified 229 paragraphs of the amended complaint. Pet. 19a.

Aside from concluding that the district court's factual determinations were unsupported or inadequately supported, the court of appeals concluded that the trial court had committed legal error. The Department's reliance on F.R. Civ. P. 33(d) for its initial response was not foreclosed by applicable precedent and was not frivolous. Pet. 18a; *see also Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221, 226 (10th Cir. 1976)(Rule 33(d) permits a party to answer interrogatories by referring the party seeking information to business records; an offer to segregate those records shows that answers to the interrogatories could be derived from the records and furnishes sufficient specificity to meet the Rule's standards), *cert. denied*, 429 U.S. 886 (1976). The district court had also erred when it based the severity of the discovery sanction in part on wrongful retaliation by some Department employees. Pet. 19a. Rule 37(b)(2) is not a catch-all disciplinary provision. By its own terms, its scope is limited to authorizing

district courts to punish a party that "fails to obey an order to provide or permit *discovery*," so long as such punishment is just. (Italics added). Disobedience of *non*-discovery orders are punishable only by means other than Rule 37(b). Those means are fully adequate, as the district court demonstrated when it held Department employees in civil and criminal contempt.

In short, the court of appeals performed its proper appellate role of reviewing the factual history of the litigation to determine whether the preclusion order was "just." Based on that review, the court could reasonably hold that essential findings by the trial court were clearly erroneous and based on misapplication of relevant law. No further review is necessary.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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